82-1724

In The

Supreme Court of the United States

October Term, 1982

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER,
SUSAN BUTLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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QUESTIONS PRESENTED

1. Does New York State Penal Law §240.35-3, Loitering for the Purpose of Engaging in Deviate Sexual Intercourse, represent a valid exercise of the State's power to control public order?

2. Is New York State Penal Law §240.35-3 violative of any rights protected under the United States Constitution?

LIST OF PARTIES

THE PEOPLE OF THE STATE OF NEW YORK,
RICHARD J. ARCARA,
DISTRICT ATTORNEY OF ERIE COUNTY,

Petitioner

ROBERT UPLINGER,
SUSAN BUTLER,

Respondents

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OPINION BELOW

Respondent Uplinger was convicted on November 16, 1981 following a non-jury trial in the Buffalo City Court. Charges against Respondent Butler were dismissed in Buffalo City Court by order dated October 8, 1981.

Timely notices of appeal were filed in each case and, on May 3, 1982, in a Memorandum and Order, County Court Judge Joseph P. McCarthy found the statute, Penal Law §240.35-3, constitutional as to all defendants. (See Appendix B, 113 Misc.2d 876.) Leave to appeal to the New York State Court of Appeals was sought on behalf of Respondents Uplinger and Butler and was granted by Certificate of Hon. Matthew J. Jasen, Associate Judge of the Court of Appeals by order dated May 25, 1982.*

*A third defendant, Fredericka Sanders, was convicted in the Buffalo City Court of the same offense and appealed her conviction to the Erie County Court. After affirmance there, she declined to seek leave to appeal to the Court of Appeals and is not a party here.

By Memorandum dated February 23, 1983, the New York Court of Appeals reversed the order of County Court and dismissed the informations as to both respondents. (Order and Memorandum attached as (Appendices A & B). Memorandum at 58 NY2d 936.)

JURISDICTION OF THIS COURT

On February 23, 1983, the New York State Court of Appeals held New York Penal Law §240.35-3 to be repugnant to the Constitution of the United States, thereby reversing the judgment of the Erie County Court with respect to Respondents Uplinger and Butler. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEW YORK STATE PENAL LAW

§240.35 Loitering

A person is guilty of loitering when he:

* * *

3. Loiters or remains about a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature; . . .

* * *

Loitering is a violation.

§130.38 Consensual Sodomy

A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person.

Consensual sodomy is a class B misdemeanor.

STATEMENT OF THE CASE

PEOPLE V. UPLINGER

Respondent Robert Uplinger was arrested on August 7, 1981 for the offense of Loitering pursuant to New York State Penal Law §240.35-3.

Officer Steven Nicosia, assigned to the Bureau of Vice Investigation of the Buffalo Police Department was working undercover in the vicinity of 140 North Street in the City of Buffalo, New York. While in the area, characterized as a quiet residential neighborhood, Nicosia was approached by Uplinger, who engaged the officer in conversation. The group of individuals which had congregated on the steps of 140 North Street, including Nicosia and Uplinger, were ordered to disperse by other police officers. As Nicosia walked away, he was followed by Uplinger. When Nicosia indicated that he was afraid of the police and wanted to leave, Uplinger stated:

"Well if you drive me over to my place or go over to my place I'll blow you."

Uplinger was thereafter placed under arrest for a violation of Penal Law §240.35-3.

A portion of the hearing was devoted to facts regarding the character of the neighborhood where these acts were alleged to have taken place. Residents had expressed apprehension about walking in the neighborhood, particularly past groups of homosexuals, and had been inconvenienced by the sounds of idling cars and indiscreet conversations. Pedestrians waiting for a bus have been propositioned for homosexual acts, as has a city councilman while waiting in his car.

After a hearing and non-jury trial, Buffalo City Court Judge Timothy J. Drury denied respondent's motion to dismiss the accusatory instrument on the ground that the statute was unconstitutional and found respondent guilty as charged. Uplinger was sentenced to pay a fine of $100.00.

PEOPLE V. BUTLER

Respondent Susan Butler was arrested on April 1, 1981 for the offense of Loitering pursuant to New York State Penal Law §240.35-3.

At the time of her arrest, respondent Butler, a known prostitute, was observed waving at passing cars by Officer Kenneth Burgstahler, assigned to the Bureau of Vice Investigation of the Buffalo Police Department. At one point she engaged in a conversation with the driver of an automobile and, after two or three minutes, entered the automobile. After the vehicle backed down a side street, the officer circled the block, located the car and observed Respondent committing an act of oral sodomy on the driver. Both participants were thereafter arrested for loitering to commit a deviate sexual act.

Respondent entered a plea of not guilty and a hearing was thereafter held with respect to her motion to dismiss the accusatory instrument on the ground that the statute was unconstitutional. By an undated memorandum and subsequent order dated October 8, 1981, Buffalo City Court Judge Timothy J. Drury granted respondent's motion and dismissed the charges.

THE APPEALS

Appeals from each of the determinations were properly taken to the County Court of Erie County. In a Memorandum and Order applicable to both cases dated May 3, 1982, Erie County Court Judge Joseph P. McCarthy affirmed the conviction of Respondent Uplinger and reversed the determination with respect to Respondent Butler, reinstating the charge. Leave to appeal to the Court of Appeals was granted. Respondents claimed on appeal that their right to due process and their freedoms of speech and association had been violated. While failing to articulate the precise basis for the constitutional violation, the New York Court of Appeals nonetheless found the statute to be unconstitutional. The Court did liken the statute in this case to one struck down in *People v. Onofre,* 51 NY2d 476, cert. den. 451 U.S. 987, where the issues had been the denials of the right to privacy and equal protection under the law.

REASONS FOR GRANTING CERTIORARI

New York State Penal Law Section 240.35-3 represents a valid exercise of the state's power to control public order.

The decision of the New York State Court of Appeals upon which petitioner seeks review held the state's loitering statute to be unconstitutional, yet on unspecified grounds. The thrust of the decision appears to be founded upon an earlier decision in

People v. Onofre, 51 NY2d 476, cert. denied 451 U.S. 987, where the court had found New York's Consensual Sodomy statute, Penal Law §130.38 to be unconstitutional on grounds of equal protection and right to privacy. Finding no valid state interest in regulating one's private consensual sexual activities and no discernible reason for differentiating between married and unmarried couples, the Court of Appeals invalidated the consensual sodomy statute on the basis of overbreadth.[1]

In the present case, the court found that since the loitering statute "must be viewed as a companion statute," the loitering statute must also fall. That legal reasoning not only fails to articulate the particular basis for the declaration of unconstitutionality, it ignores basic principles of constitutional law.

The statute, contrary to the conclusion of the New York Court of Appeals, does not seek solely to punish conduct anticipatory to consensual sodomy. Its focus is on public order and is, rather, in the nature of a harassment statute. Although the Court of Appeals concluded that the Legislature could have enacted a law which prohibited accosting another in an offensive manner, it is clear that the statute in question was enacted for just that purpose. As pointed out by the lone dissenter at the Court of Appeals, the Legislature made a determination that "the vast majority of people prefer to go about their everyday business without being stopped or solicited, especially when the solicitation involves offers to engage in the most intimate of activities." In essence, the Legislature concluded that in the control of public order, there

[1]To the extent that the decision in the present case was predicated upon *People* v. *Onofre, supra,* and represents an improper extension of an unfounded decision, petitioner requests that in the event certiorari is granted with respect to the loitering statute, that review also be granted with respect to the consensual sodomy provision.

existed a right reserved to the public in general which would allow them to be free from verbal assaults involving proposed sexual activities. In its decision, the Court of Appeals has determined that the individual's right to privacy gives rise to a right to solicit and that the rights of the vast majority of the public must be subjugated to the whims of the few.

The rights now claimed by respondents are, however, not absolute and are subject to restraint under proper circumstances. Even the freedom of speech, the cornerstone of our civilization, has been found to be properly limited when countervailing rights of the public exist. This Court has recognized certain exceptions applicable to First Amendment guarantees. Not only has the Court found First Amendment protection to be lacking in speech calculated to provoke a fight, (*Chaplinsky v. New Hampshire,* 315 U.S. 568), obscenity (*Roth v. United States,* 354 U.S. 476), libel, (*Gertz v. Robert Welch, Inc.,* 418 U.S. 323) and exploitation of children, (*New York v. Ferber,* ____ U.S. ____, 102 S.Ct. 3348); it has sustained the constitutionality of zoning ordinances which sought to differentiate based upon the content of communications which were entitled to First Amendment protection.

In *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, this Court had the opportunity to evaluate certain zoning ordinances of Detroit, Michigan which provided that an adult theatre could not be located within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area. In acknowledging that "the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect," the Court clarified the First Amendment concerns in its decision:

> "Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser,

> magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment.[2] Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theatres of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures. 427 U.S. at 70-71."

The present statute does not attempt to control private sexual activities, but merely seeks to prevent the public loitering for purposes of engaging in deviate sexual acts. It does not, therefore, run afoul of those decisions which prohibit a total suppression of First Amendment rights.

A further refinement of the First Amendment rights occurred in *F.C.C. v. Pacifica Foundation,* 438 U.S. 726, where this Court ruled that action by the Federal Communications Commission based upon a radio broadcast of a comedian's monologue which was concededly not obscene, but nonetheless offensive, was countenanced under the First Amendment.

> "If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content — or even to the fact that it satirized contemporary attitudes about four-letter words — First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when

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[2] "I disapprove of what you say, but I will defend to the death your right to say it." 427 U.S. at 63.

> he said: 'Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' *Chaplinsky v. New Hampshire,* 315 U.S., at 573," 437 U.S. at 746. (Footnotes omitted.)

Although partially based upon the broadcast medium involved, and recognizing that the alternative of turning off the radio did exist, the Court nonetheless found that material deemed "offensive," as opposed to "obscene," could be barred. In discounting the alternative suggested, the Court noted "that one may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place." 438 U.S. at 749.[3]

If it is true that we are often captives outside the sanctuary of our homes and subject to speech which would be deemed objectionable, *Cohen v. California,* 403 U.S. 15, the limits of protected speech are exceeded by propositions from sexual purveyors, whether prostitute or friendly homosexual. At issue in Cohen was the defendant's jacket, bearing the words "Fuck the Draft." Partially in view of the strongly political overtones of the message, this Court found such to be protected. Similarly, in *Erznoznik v. City of Jacksonville,* 422 U.S. 205, this Court found that an ordinance prohibiting the exhibition of any motion picture, visible from the street, containing mere nudity of buttocks, breasts or pubic areas was unconstitutional. Due in part to the protected nature of the speech involved, the Court concluded that passing members of the public could avert their eyes.

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[3]Consider the content of such an obscene telephone call and the content of a solicitation occurring while on a casual walk down a residential street. While the former is deemed criminal (New York State Penal Law §240.30) when the recipient experiences no present danger and has the opportunity to hang up, the New York Court of Appeals determined that the event occurring in person and, presumably, offering greater affront to the individual, is clothed in constitutional protections.

In the present case, however, the conduct involved was not limited to non-obscene displays or political commentary; it was conduct directly related to soliciting a sexual partner. If we acknowledge that a right of privacy exists which necessarily includes the right of an individual to engage in whatever sexual practices he desires in the confines of his own home, then there must exist a concomitant right to the individual on the street to be free from affronts to his own right to privacy. Such was recognized by the dissent at the Court of Appeals as a legitimate state purpose to be served in proscribing loitering for the purpose of soliciting deviate sexual activities.

Although the mere existence of other state statutes which proscribe the same or similar conduct will not make valid an unconstitutional enactment, it is indicative of a collective legislative intent to regulate offensive overtures to unwilling participants. Some nineteen states have laws similar to New York's which prohibit either loitering for solicitation or solicitation directly.[4] Five additional states have laws which prohibit sodomy or consensual sodomy and corresponding provisions which prohibit the solicitation to commit a crime.[5]

Challenges to these statutes have come from a variety of perspectives with varying degrees of success. In *State* v. *Tusek*, 52 Or. App. 997, a successful challenge to an Oregon statute

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[4]Alabama: Crim. Code §13A-11-7(a)(3); Arizona: Crim. Code §13-2904; Arkansas: Ark. Stat. Ann. 41-2914; California: Pen. C.A. §647; Colorado: Col. Crim. Code §18-9-112; Delaware: Del. C. §11-1321; Georgia: Ga. Code Ann. 26-2003; Kansas: K.S.A. 21-4108; Maryland: Ann. Code Art. 27 §15; Massachusetts: ALM GL c.272 §53; Michigan: MSA §28.570; Nevada: NRS §207.030; New Jersey: N.J.S.A. 2A:170-5; North Carolina: G.S. 14-204; Ohio: R.C. 2907.07; Oklahoma: 21 O.S. §1029; Oregon: O.R.S. 163-455; Rhode Island: G.L. 11-10-1; Wisconsin: WSA 947-02.

[5]Montana: MCA 45-4-101, MCA 45-5-505; South Carolina: Code 16-1-40, Code 16-15-120; Tennessee: T.C.A. 39-1-401, T.C.A. 39-2-612; Utah: U.C.A. 76-2-202, U.C.A. 76-5-403; Virginia: Code of Va. 18.2-29, Code of Va. 18.2-361.

similar to New York's came under the guise of a violation of free speech under the First Amendment. In *People* v. *Gibson*, 521 P.2d 774, a corresponding Colorado statute met a similar fate, but on Fourteenth Amendment Due Process grounds that the loitering had not been coupled with any other overt conduct. Massachusetts and California each sustained the constitutionality of similar statutes, but by imposing a judicial construction which more explicitly defined the conduct prohibited and by limiting the conduct to public places. *Pryor* v. *Los Angeles Municipal Court*, 25 Cal. 2d 238, 599 P.2d 636; *Commonwealth* v. *Sefranka*, ____ Mass. ____, 414 N.E.2d 602.

The type of statute under consideration is not unique to New York, nor is the tenor of the attacks upon these statutes. In spite of the existence of a valid state purpose in controlling invasions to the right of privacy of every citizen, state courts have utilized their considerable powers to declare statutes unconstitutional without proper reference to the principles underlying that power or the competing rights to be protected. In view of the continuing litigation in this area, the differing results achieved and the grounds therefore, review by the Supreme Court at this time would serve not only to provide the vehicle for a proper determination in the instant case, but would provide the opportunity to lend guidance to other courts which will undoubtedly face challenges to their statutes regulating similar conduct.

New York State Penal Law §240.35-3 in neither its enactment nor its enforcement violates constitutional standards

While not specifically forming the basis for the holdng of the Court of Appeals, respondents had there asserted a number of other constitutional rights in order to bring about a determination that the statute was unconstitutional. In view of the lack of clarity in the memorandum decision of the Court of Appeals, it is prudent to review the other challenges in order to establish that no other constitutional infirmity exists in the statute.

A

DUE PROCESS VOID FOR VAGUENESS

Respondents contended that the statute, which proscribes loitering for the purpose of "deviate sexual intercourse or other sexual behavior of a deviate nature," is unconstitutional due to the inherent vagueness of the above phrase. Although conceding that "deviate sexual intercourse" is appropriately defined in Penal Law §130.00-2, they nonetheless claimed that the remainder of the phrase, "other sexual behavior of a deviate nature" is not susceptible of adequate definition.

The definitional statute, proscribing "sexual conduct between the persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis or the mouth and the vulva," Penal Law §130.00-2, is sufficiently definitive to limit the scope of "other sexual behavior of a deviate nature." Under principles of *ejusdem generis,* the scope of the phrase is measured by the terms surrounding it.

> "'Where words of specific or inevitable purport are followed by words of general import the application of the last phrase is generally confined to the subject matter disclosed in the phrases with which it is connected; for it is known by the company it keeps; and though it might be capable of a wider significance if found alone, it is limited in its effect by the words to which it is an adjunct. It may strengthen the general structure, but it cannot exceed the original outline.' (McKinney's Cons. Laws of N.Y., Book 1, Statutes [1942 ed.], §239, citing *People v. Richards,* 108 N.Y. 137, *People v. Lamphere,* 219 App. Div. 422, and numerous other cases.)" *People v. Bell,* 306 NY 110, 115 (1953).

All that is constitutionally required is that the statute "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford,* 408 U.S. 104, 108. In the present case, both respondents had either engaged, or offered to engage, in conduct which involved contact between mouth and penis, conduct clearly embraced by the terms of the statute. Absent is any appreciable degree of uncertainty which would place an unwarranted amount of discretion in the hands of the police, judges or juries. *Papachristou v. City of Jacksonville,* 405 U.S. 156. Since other less offensive forms of sexual contact as opposed to sexual intercourse are defined in another section,[6] they are removed from consideration of what might be considered deviate sexual intercourse.

Since the statute is sufficiently clear on its face as to the conduct proscribed, and does not place an impermissible level of discretion in the hands of the police, it is not unconstitutionally vague.

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[6]Penal Law §130.00-3 defines "sexual contact" as "any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party."

B

FREEDOM OF SPEECH

Respondents raised a variety of First Amendment claims couched generally in terms of the free speech aspects of the verbal act of soliciting another individual to commit a deviate sexual act. While they contended that the statute in question punishes the exercise of those rights, in fact, the statute's primary focus is on the act of loitering; the speech which appellant claims is protected is merely evidence of the intent of the defendant.

Far back in this Court's protection of First Amendment rights it became evident that not all forms of speech and press were protected and that speech integral to the commission of a crime deserved no protection. In *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, this Court held as follows:

> ". . . it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." 336 U.S. at 502.

More recently, in *Healy v. James,* 408 U.S. 169, the Court continued the distinction.

> ". . . the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not." 408 U.S. at 192.

What has also evolved is a differing set of standards delineating the degree of protection to which any particular form of expression is entitled. While at one time it might have been said that speech was either entitled to protection under the First Amendment or not, depending on whether it exceeded the bounds set for certain types of speech (e.g. obscenity — *Roth v. United States,* 354 U.S. 476; fighting words — *Chaplinsky v.*

New Hampshire, 315 U.S. 568; criminal activity — *Brandenburg v. Ohio,* 395 U.S. 444), that black/white dichotomy has expanded into a spectrum of grays between those polar extremes.

While the Court at one time suggested only that an unwilling viewer of non-obscene, yet offensive, material avert his eye (*Cohen v. California,* 403 U.S. 15; *Erznoznik v. City of Jacksonville,* 442 U.S. 205), the Court has more recently chosen to differentiate, based upon the content and type of the communication, as to the *degree* of protection to be afforded (*F.C.C. v. Pacifica Foundation,* 438 U.S. 726; *California v. LaRue,* 405 U.S. 109).

In *LaRue, supra,* the Court upheld California liquor authority regulations prohibiting explicitly sexual live entertainment and films at bars licensed by the state. In doing so, the Court noted as follows:

> "The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, "performances" that partake more of gross sexuality than of communication.
>
> * * *
>
> This is not to say that all such conduct and performance are without the protection of the First and Fourteenth Amendments. But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theatre." 409 U.S. at 118.

In *Doran v. Salem Inn, Inc.,* 422 U.S. 922, the Court reaffirmed its earlier holding and concluded that "the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression." 422 U.S. at 932.

If there exists a differing degree of protection between a scantily clad ballet troupe and a sexually provocative nude dancer in a bar, then an equally differing degree of protection exists between an intellectual discussion on the sexual practices of homosexuals and the banal offer of "if you drive me over to my place . . . I'll blow you".

The speech which respondents sought to have brought under the umbrella of the First Amendment is clearly not of the character deserving of such protection.

C

FREEDOM OF ASSOCIATION

Also challenged was the statute's inhibition of the free exercise of an individual's rights to associate with whom he chooses. As previously noted, the statute prohibits loitering, rather than any associational conduct. While respondents may view the inability to loiter as "chilling" the exercise of their rights, neither the statute, nor its enforcement is designed to inhibit such free exercise.

Not only does the character of the conduct deny the existence of constitutional protections, the protections which respondents seek to invoke are not absolute.

In *Cox v. Louisiana,* 379 U.S. 536, this Court explained the scope of the right of assembly.

> "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this

> necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuse of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection." 379 U.S. at 554.

This statement was reaffirmed in *Adderley v. Florida,* 385 U.S. 39, where the Court rejected the argument that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." 385 U.S. at 48. What appellants see as protected assembly is not a speaker or a rally or a demonstration in favor of gay rights, but a "stag line" of homosexuals offering or imposing themselves on passers-by while loitering on the street.

The teaching of *Healy v. James,* 408 U.S. 169, is not to the contrary. There, official recognition of an organization had been denied by a college, thereby denying the organization the use of facilities. Although ruling that the organization was entitled to recognition and the corollary freedom to associate, the court nonetheless concluded as follows:

> ". . . the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not. Petitioners may, if they so choose, preach the propriety of amending or even doing away with any or all campus regulations. They may not, however, undertake to flout these rules." 408 U.S. at 192.

The conduct of respondents, whether allegedly unobtrusive homosexual conduct on North Street or blatant prostitution activities on Genesee Street, is not protected by First Amendment guarantees. To attempt to justify constitutional protection under these circumstances is to strain the First Amendment beyond the limits of proper construction.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the within petition.

Respectfully submitted,

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APPENDICES

APPENDIX A

REMITTITUR OF THE NEW YORK STATE COURT OF APPEALS

Remittitur

COURT OF APPEALS — STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

CoC No. 7

The People &c., *Respondent,*

v.

Robert Uplinger, *Appellant.*

The People &c., *Respondent,*

v.

Susan Butler, *Appellant.*

The appellant(s) in the above entitled appeal appeared by Rose H. Sconiers, The Legal Aid Bureau of Buffalo, Inc.; Hodgson, Russ, Andrews, Woods & Goodyear, Esqs., the respondent(s) appeared by Hon. Richard J. Arcara, District Attorney, Erie County.

The Court, after due deliberation, orders and adjudges that the order is reversed and the informations dismissed in a memorandum. Chief Judge Cooke and Judges Jones, Wachtler, Fuchsberg, Meyer and Simons concur. Judge Jasen dissents and votes to affirm in an opinion.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Buffalo City Court, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

[SEAL]

JOSEPH W. BELLACOSA,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, February 23, 1983.

APPENDIX B

MEMORANDUM OF THE NEW YORK COURT OF APPEALS DATED FEBRUARY 23, 1983

STATE OF NEW YORK — COURT OF APPEALS

CoC No. 7

The People &C.,

Respondent,

v.

Robert Uplinger,

Appellant,

The People &c.,

Respondent,

v.

Susan Butler,

Appellant.

(7) William H. Gardner, Buffalo, for appellant Uplinger. Joseph A. Shifflett, Rose H. Sconiers, & Joseph B. Mistrett, Buffalo Legal Aid, for appellant Butler.

Richard J. Arcara, DA, Erie County (John J. DeFranks & Louis A. Haremski of counsel) for respondent.

Michael J. Lavery, NYC, for Lambda Legal Defense Fund; Sarah Wunsch & Rhonda Copelon, NYC, for Center for Constitutional Rights; Steven R. Shapiro, NYC, for NY Civil Liberties Union, amici curiae.

MEMORANDUM

The order of the County Court should be reversed and in each case the information should be dismissed.

APPENDIX B
Memorandum of the New York Court of Appeals
Dated February 23, 1983

The statute challenged on these appeals (Penal Law, §240.35, subd 3), which prohibits loitering "in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature" must be viewed as a companion statute to the consensual sodomy statute (Penal Law, §130.38) which criminalized acts of deviate sexual intercourse between consenting adults. We held in *People v Onofre* (51 NY2d 476) that the State may not constitutionally prohibit sexual behavior conducted in private between consenting adults. The object of the loitering statue is to punish conduct anticipatory to the act of consensual sodomy. Inasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose. This statute, therefore, suffers the same deficiencies as did the consensual sodomy statute. Because the statute itself is devoid of a requirement that the conduct proscribed be in any way offensive or annoying to others, the challenged statute cannot be categorized as a harassment statute.

The dissent improperly reads into this holding a blanket proscription upon all statutes directed against conduct of this nature. We do not hold that the Legislature cannot enact a law prohibiting a person from accosting another in an offensive manner or in an inappropriate place even if the underlying purpose is not a violation of law. The Legislature could also prohibit solicitation for the purpose of performing the object conduct in a public place. On the contrary, statutes of this general nature when properly drafted have been upheld by the courts. However, it is apparent from the wording of this statute that it was aimed at proscribing overtures, not necessarily

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bothersome to the recipient, leading to what was, at the time the law was enacted, an illegal act.

The dissenter's perception of the basis for conclusion of unconstitutionality is inaccurate and confuses the defendants' argument with our holding; we have neither discussed nor decided any overbreadth questions by implication or otherwise.

People v Uplinger
People v Butler

JASEN, J. (dissenting):

The majority today invalidates a provision of the Penal Law[1] designed to protect persons from being harassed on the public streets by others who seek only their own sexual gratification. Without addressing the arguments made by either the defendants or the People, they do so on the ground that this statute is nothing more than a companion statute to the consensual sodomy statute and since we have determined that the Legislature cannot proscribe sexual conduct between consenting adults in private, it cannot proscribe any conduct anticipatory to consensual sodomy. In my view, this court's decision in *People* v *Onofre* (51 NY2d 476) in no way limited the Legislature's ability to regulate public conduct, albeit anticipatory to later private conduct. As it seems to me that the statute represents a valid legislative effort to protect the public against unwarranted harassment, I am compelled to dissent.

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[1]Section 240.35 of the Penal Law provides, in pertinent part, that "[a] person is guilty of loitering when he: * * * 3. Loiters or remains in a public place for the purpose of * * * soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature".

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The history of this statute does not support the majority's contention that it "must be viewed as a companion statute to the consensual sodomy statute". Section 240.35 of the Penal Law, denominated "Loitering" and codified with other crimes concerning public order, was derived from former sections 722 and 1148 of the Penal Law. Those proscribed loitering "about any public place soliciting men for the purpose of committing a crime against nature[2] or other lewdness" or soliciting for immoral purposes.[3] The former being more closely related to the statute now before us, it too was not codified under crimes of a sexual nature, but under that part of the Penal Law denominated "Disorderly conduct". Thus, there is no indication that the Legislature was in any way addressing itself to private conduct; rather, every indication is that this statute was designed to regulate public conduct which would be considered offensive.

Whether or not the conduct which the loitering was in anticipation of is deemed criminal, it is clear that the State retains a very valid reason for proscribing loitering to solicit. Indeed, in recommending an almost identical statute, the drafters of the Model Penal Code recognized the continuing validity of this type of statute despite the adoption of the Reporters' recommendation to decriminalize consensual sodomy.

> "The rationale for retaining this offense is not the regulation of private morality but the suppression of public nuisance. Persons who publicly seek or make

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[2]Crimes against nature were defined in former section 690 of the Penal Law and incorporated all acts of sodomy, consensual or otherwise.

[3]The later section was clearly aimed at pimping activities as it also made it a crime to live wholly or in part on the earnings of a prostitute.

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themselves available for deviate sexual relations openly flout community standards. Moreover, indiscriminate solicitation in public streets, parks, and transportation facilities is not only an affront to moral and aesthetic sensibilities; it is also a source of annoyance to, and harassment of, members of the public who do not wish to become involved. Section 251.3 is designed to protect the legitimate expectations of citizens in public places by proscribing this kind of annoying activity. For that reason the offense is not limited to loitering for hire, as is the case under Section 251.2 on prostitution." (Model Penal Code, § 251.3, Comment, at p. 476.)

In light of this background and its codification under "Public Order" in the Penal Law, I fail to perceive how the majority can conclude that the statute is not a harassment statute. There is no necessity that the statute require the conduct proscribed to be offensive or annoying to others. This statute embodies the Legislature's determination that public solicitation to engage in sexual conduct is necessarily offensive to others. While some may welcome such offers, there is nothing irrational in the Legislature's determination that the vast majority of people prefer to go about their everyday business without being stopped or solicited, especially when the solicitation involves offers to engage in the most intimate of activities.

Nor is it irrational for the Legislature to have decided that the presence of people soliciting in public to engage in sexual conduct is in and of itself annoying. In addition, such conduct can be annoying, offensive and even threatening to those who are not directly solicited but merely observe such conduct. It is not difficult to envision persons being annoyed and offended if the person they are walking with is solicited. Certainly such conduct is, at a minimum, an annoyance to those who reside in

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the immediate area who must witness the public solicitation of sexual partners. The Legislature's legitimate concerns with the interests of those people who desire only to live a quiet and private life mandates that it be allowed to determine when and where certain conduct is no longer protected but becomes harassment of others. Thus, I do not believe one can say, as does the majority, that "[t]he object of the loitering statute is to punish conduct anticipatory to the act of consensual sodomy." The statute just as clearly has as an object the regulation of conduct which becomes offensive because it occurs in public.

I am further troubled by the majority's reasoning because, although they do not state that they are invalidating the statute by application of the overbreadth doctrine, it seems to me that that rationale is implicit in their statement that (at p. 938) "[i]nasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose." To my mind, a conclusion that the statute is unconstitutional based on this reasoning indicates that loitering in anticipation of consensual sodomy is protected just as consensual sodomy is protected. I fail to perceive what basis there is to invalidate a statute on reasoning that it reaches protected activity except on the basis that by encompassing that protected activity it is overbroad. The very concept of the overbreadth doctrine is that a statute which encompasses protected activity as part of an effort to proscribe other conduct is constitutionally flawed because of its scope — in other words, because it is overbroad. (*Arnett* v *Kennedy* 416 US 134; Tribe, American Constitutional Law, § 12-26, pp 710-724.)

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The majority's reference to *People* v *Onofre* (51 NY2d 476, *supra)* also leads me to conclude that the majority is depending, at least in part, on the doctrine of overbreadth. They conclude: "This statute, therefore, suffers the same deficiencies as did the consensual sodomy statute." This court held section 130.38 of the Penal Law, which proscribed consensual sodomy to be unconstitutional "[b]ecause [it was] *broad* enough to reach noncommercial, cloistered personal sexual conduct of consenting adults". (*People* v *Onofre, supra,* at p 485.)

I cannot concur in the majority's analysis because I do not believe that this statute is overbroad and because I do not believe that the overbreadth doctrine should be applied in this case.

In deciding whether or not a statute is facially overbroad because it reaches protected as well as unprotected activity, the Supreme Court has set down certain guidelines. First, "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." (*Broadrick* v *Oklahoma,* 413 US 601, 610.) Thus, defendant Butler, who was flagging down cars while making loud and overt offers to sell sexual favors, cannot be heard to raise a claim that this statute is invalid because it might be used against someone else who is quietly standing on the street corner having the intent to make an indiscreet offer to a passerby.

As to defendant Uplinger, one must assume the majority accepted his argument that speech aimed at finding a sexual partner to engage in deviate sex is protected because the sexual conduct to be engaged in is no longer illegal. (*People* v *Onofre,* 51 NY2d 476, *supra.*) In doing so, the majority apparently

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applies the exception in the First Amendment area which allows a person to challenge a statute as having an overbroad and, hence, unconstitutional scope even though his own conduct might be proscribed by a narrow interpretation of the statute. The majority apparently overlooks the Supreme Court's admonition that the overbreadth doctrine should be "employed by the Court sparingly and only as a last resort" and should not be "invoked when a limiting construction has been or could be placed on the challenged statute." (*Broadrick* v *Oklahoma*, 413 US 601, 613, *supra.*) In this case, we would comport with the Supreme Court's mandate were we to interpret the statute as requiring a public act of solicitation to engage in deviate sex such as defendant Uplinger was arrested for. Although solicitation may be verbal in nature, it certainly involves conduct which is greater than speech alone.

Additionally, we should avoid invalidating a statute *in toto* on the ground that it is overbroad as applied to some conduct if it can be validated as to other conduct. As the Supreme Court stated: "[O]verbreadth claims, if entertained at all [should be] curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct." (*Broadrick* v *Oklahoma, supra,* at p 613.) Thus, in *Cantwell* v *Connecticut* (310 US 296), a conviction under Connecticut's breach of peace statute was set aside because the defendant's conduct was found to be protected by the First Amendment. This, however, did not require that the statute proscribing conduct which breached the peace be invalidated in all respects.

In this case then, even if the majority concluded that defendant Uplinger's conduct was protected by the First Amendment or that he could raise possible conflicts with the First Amendment, it would be unnecessary to invalidate the

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entire subdivision of section 240.35 of the Penal Law. Instead, it seems to me the proper remedy would be to apply a limited construction interpreting the statute to proscribe only acts which amount to public solicitation to engage in sexual conduct. That would be sufficient to validate the statute. Furthermore, such a construction would eliminate any fear that the broad wording of the statute would deter protected speech, particularly because such an interpretation addresses the statute to conduct as well as speech. As the Supreme Court noted in *Broadrick* v *Oklahoma:* "Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect — at best a prediction — cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." (*Supra,* at p 615.)

Because I do not believe that this statute when read to proscribe acts of solicitation in a public place must be invalidated under the overbreadth doctrine, it is necessary to address defendant's further contention that the statute must fall on vagueness grounds. In my view, the statute is not vague as to the specific conduct prohibited and, thus, does not allow arbitrary or discriminatory police enforcement. For a statute to be deemed unconstitutionally vague, it must be shown that it " 'fails to give a person of *ordinary intelligence fair notice* that his contemplated conduct is forbidden by the statute.' " (*Papachristou* v *City of Jacksonville,* 405 US 156, 162 [emphasis supplied], quoting *United States* v *Harriss,* 347 US 612, 617). All that is required is that the "statute must be sufficiently definite to give a *reasonable* man subject to it notice of the nature of what is prohibited and what is required of him." (*People* v *Pagnotta,* 25 NY2d 333, 337 [emphasis supplied],

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citing *People* v *Byron*, 17 NY2d 64, 67; *Lanzetta* v *New Jersey*, 306 US 451.)

Applying this well established rule to the statute before us, I believe the statute sufficiently informs a person of the criminal implications of loitering in a public place for the purpose of "*soliciting* another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature." (Penal Law, § 240.35, subd 3 [emphasis supplied].) The statute does not merely proscribe loitering, but points up the prohibited conduct — "soliciting another person to engage, in deviate sexual intercourse" — in language sufficiently definite to give a person of ordinary intelligence fair notice of the conduct forbidden. Thus, only those persons who solicit others in a public place and thereby create a public nuisance would be subject to arrest and prosecution under the statute. Since it is abundantly clear from the language of the statute that the Legislature intended to proscribe public acts of solicitation to engage in deviate sexual activities, such an interpretation of the statute is reasonable and the statute should be upheld just as we have upheld other statutes where the Legislature designated the conduct proscribed. (*People* v *Pagnotta*, 25 NY2d 333, *supra; People* v *Smith*, 44 NY2d 613.)

Thus, this statute should not fail on the reasoning of *Papachristou* v *City of Jacksonville* (405 US 156, *supra*) or *People* v *Berck* (32 NY2d 567, cert den 414 US 1093). Those cases addressed themselves to statutes which proscribed loitering under circumstances arousing suspicion (*People* v *Berck, supra*) and statutes which essentially allowed a person to be arrested because of conceivably innocent conduct (*Papachristou* v *City of Jacksonville, supra*). The latter was offensive because it was impossible for the ordinary person to

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know when he had transgressed the statute and thereby avoid doing so. In turn, this meant that the police had unbridled discretion as to when and against whom they would apply the statute. Similarly, in *People* v *Berck (supra),* we found a statute proscribing loitering under suspicious circumstances unconstitutional because the ordinary person could not be expected to know when the circumstances were adequately suspicious to trigger an arrest. The essential flaw in those statutes was the excessive discretion given the police due to the subjective standard the statutes incorporated. Such a standard meant that criminality turned largely on how the arresting officer viewed a person's conduct. Such is not the case with this statute; rather, specific conduct — an act of solicitation occurring in a public place and involving an offer of sexual activity — is required before police action is warranted.

There is an additional question that must be addressed before it can properly be said that a statute is constitutional. When a statute "places some restriction upon an individual's freedom of action in the name of the police power [that law] must bear some reasonable relation to the public good." (*People* v *Pagnotta,* 25 NY2d 333, 337, *supra,* citing *People* v *Bunis,* 9 NY2d 1, 4.) For this reason, we have validated statutes which proscribe conduct in a school yard (*People* v *Johnson,* 6 NY2d 549), on the waterfront (*People* v *Merolla,* 9 NY2d 62), and in the hallways of public buildings when related to narcotics use (*People* v *Pagnotta,* 25 NY2d 333, *supra)* because there is a valid public interest involved in regulating conduct in those areas. So, too, is there a valid public interest in regulating conduct in public places when that conduct infringes on another person's right to privacy and to be free from harassment. Clearly, such conduct will and is directed not only at those making themselves available for such solicitation, but

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it is also directed to any person who happens down the street, regardless of how innocently that person happens to be there. Furthermore, such *conduct* can offend not only those who are solicited, but those who must, due to the necessity of being in the area, observe and overhear such conduct. In my view, it is within the power of the Legislature to regulate such conduct by proscribing solicitation related to sexual activity, even activity protected by an individual's right to privacy, when that solicitation occurs in a public place.

Accordingly, by interpreting the statute to proscribe only the overt act of solicitation in a public place, I believe the statute passes constitutional scrutiny under either the overbreadth doctrine or the vagueness doctrine. I do not, at this time, portend, as the majority suggests, to pass on the constitutionality of all statutes directed at "conduct of this nature", but merely speak to the statute before us. In so interpreting this statute, we fulfill our obligation to sustain the constitutionality of the statute if such construction can fairly be held to have been within the contemplation of the Legislature. Given the clear intent of the Legislature to address offensive public behavior, it cannot be said that such an interpretation would constitute judicial legislation.

Given this interpretation and perspective on the statute and its derivation, I cannot agree with the majority that it is only designed to proscribe conduct anticipatory to the act of consensual sodomy. No person should have the right to create a public nuisance or disturb others on the street so that he may later engage in private sexual conduct. The Legislature certainly is within its authority to regulate conduct in public and I believe they have done so in a constitutional manner in this case.

* * * * *

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Chief Judge Cooke and Judges Jones, Wachtler, Fuchsberg, Meyer and Simons concur in a memorandum; Judge Jasen dissents and votes to affirm in an opinion.

In each case: Order reversed, etc.

APPENDIX C
MEMORANDUM AND ORDER OF THE ERIE COUNTY COURT DATED MAY 3, 1982

STATE OF NEW YORK
COUNTY COURT — ERIE COUNTY

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

ROBERT UPLINGER,

Appellant.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

FREDERICKA SANDERS,

Appellant.

PEOPLE OF THE STATE OF NEW YORK,

Appellant,

vs.

SUSAN BUTLER,

Respondent.

RICHARD J. ARCARA, ESQ.
District Attorney of Erie County
By: ERNEST G. ANSTEY, ESQ.
Assistant District Attorney
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MEMORANDUM AND ORDER

McCARTHY, J.

The defendants in these appeals contend that subdivision 3 of section 240.35 of the Penal Law which proscribes loitering in public for the purpose of soliciting another to engage in deviate sexual intercourse is violative of rights protected by our federal and state constitutions.

The statute in question provides as follows:

> "§240.35 Loitering
>
> A person is guilty of loitering when he:
>
> . . .
>
> 3. Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature".

The facts in each case may be quickly summarized. The evidence offered against Robert Uplinger shows that he approached a male undercover Buffalo Police Officer in front of a residential hotel in the City of Buffalo at about 3:00 a.m. on August 7, 1981. He invited the officer to his apartment for the purpose of engaging in fellatio. Uplinger was found guilty of

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having violated the loitering statute and he concedes that his guilt under its text is clear.

Defendant Fredericka Sanders was also found guilty of the same offense after trial. She was observed by a police officer at about 12:40 a.m. on April 15, 1981, walking back and forth near a street corner glancing at cars. After approximately 10 minutes an automobile stopped, the defendant entered the vehicle and it drove away. It was then parked on a nearby street about two blocks away. The officer approached the car and, using his flashlight, observed the defendant performing a sodomous act with the male driver.

Defendant Susan Butler was also charged with having violated this loitering statute. She was observed standing near a street corner waving to passing motorists during the early morning of April 1, 1980. Within a few minutes a car stopped, the defendant spoke with the driver and entered the vehicle which was then parked nearby. The officer walked to the vehicle and witnessed the defendant engaging in oral sodomy. The charge against defendant Butler was dismissed upon a determination, following a hearing, that Penal Law §240.35 (subd [3]), as applied, is violative of the equal protection clause of the Fourteenth Amendment and is also unconstitutionally vague.[1]

The People appeal from the order of dismissal in the Butler case, and the defendants Uplinger and Sanders appeal from their judgments of conviction.

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[1]Although the defendants Butler and Sanders may have been charged with other violations of the Penal Law based upon their observed conduct, the sole concern here relates to the validity of section 240.35 (subd [3]).

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Dated May 3, 1982

In evaluating a challenge to a legislative enactment, it is fundamental that the infirmity of the statute must be demonstrated beyond a reasonable doubt (*People* v *Pagnotta*, 25 NY2d 333, 337). The contentions of the defendants, therefore, must be measured against this standard.

The defendants on these appeals urge that section 240.35 (subd[3]) is defective and unconstitutional on the ground that it prohibits lawful conduct; that it unreasonably restricts free speech; that it improperly punishes one's mental operation alone; that it violates the equal protection clause; that it is selectively enforced; and that it is void for vagueness.

Initially, relying upon *People* v *Onofre*, (51 NY2d 476), which held that our State's consensual sodomy statute (Penal Law §130.38) is unconstitutional, the defendants maintain that loitering for the purpose of soliciting others to engage in constitutionally protected activity may not be outlawed. The defendants observe correctly that a statute which prohibits loitering, without more, is not sustainable inasmuch as it fails to specify the prohibited conduct (see *People* v *Berck*, 32 NY2d 567). Coupling this factor with the *Onofre* determination, the defendants conclude that section 240.35 (subd[3]) cannot withstand attack because it prohibits sodomy in private between consenting adults which is no longer a crime in this State. This approach assumes that the object of the loitering must itself be criminal conduct. However, no such specific requirement is found in organic law, statutory enactment or decisional authority. The question here is not whether the prohibited act is criminal but whether its proscription is rationally related to the interests of public morality. The Court of Appeals has made clear in *Onofre* that concerns for public morality are legally cognizable and those concerns are now fully applicable.

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It is also contended that since sodomy performed by consenting adults in private is legal, there must in accord with the guarantees or free speech be permitted some limited communication whereby one can solicit another to engage in such conduct. In support of this position the defendants focus upon the manner of the solicitation. It is argued that a discreet, non-obtrusive invitation is permissible as opposed to one audible to other members of the public. Under this view the sensibilities of the public deserve protection; however, when an individual member of the public is singled out, his or her sensibilities become inconsequential. This line of reasoning underscores, in part, the purpose of this legislation. Such offenses are designed to suppress public nuisance not to regulate private morality. Indiscriminate public solicitation for deviate sex constitutes a contemptuous disregard for community standards, facially defies moral and aesthetic sensibilities, and annoys individuals who do not wish to become involved in such activities. Surely the reasonable and legitimate expectations of citizens in public places may be protected from this undesired annoying behavior. (Model Penal Code, §251.3, p 476). These factors expressly alluded to by the Court of Appeals in *Onofre* provide a valid and rational basis to interdict the conduct described in section 240.35 (subd [3]).

The defendants may not anchor their claims to the right of free speech guaranteed by the First Amendment. The statute simply impedes the solicitation of others for deviate sexual activity only by individuals loitering in public places. It does not punish speech alone. Obviously what we have a right to do or say in private, we do not always have a right to do or say in public. This statute does no more than reasonably and narrowly limit one's opportunity to solicit others to engage in deviate sex and it does so without trespassing upon the right of

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free speech. Any criminal statute may have an incidental effect on speech (*People* v *Smith*, 44 NY2d 613, 623). The view that this law constitutes a "total ban" on free speech is without merit and no support for this position may be drawn from *Bellanca* v *New York State Liquor Authority*, (54 NY2d 228). There the Court addressed a statute barring all topless dancing performances to willing customers under all circumstances. In sharp contrast, this statute does not bar all solicitations; nor, significantly, may it be concluded that the individuals solicited willingly subject themselves to such behavior. Surely, one's use of the public thoroughfare does not signify a receptivity to advances of this sort.

Next, the claim that section 240.35 (subd [3]) unconstitutionally proscribes loitering with the purpose of engaging in deviate sexual conduct but without requiring overt conduct on the part of an accused is also rejected. Although this statute embraces the lowest grade of offense within the Penal Law, the unyielding requirements of probable cause to arrest and of proof beyond a reasonable doubt to convict are nevertheless fully applicable and serve to protect completely one's entitlement to due process. This statute must — as the police officers in these cases have — be interpreted so as to require either an overt act or other conduct unambiguously evidencing the proscribed purpose.

With respect to the contention that this statute violates the right to equal protection, it is argued that the law is fatally underinclusive since it does not bar solicitation to engage in non-deviate sexual conduct. The statute does, however, treat all persons under similar circumstances alike and there is no requirement that a statute regulate every class to which it might be applied. Equal protection is not denied because a statute

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Dated May 3, 1982

does not include other related activities within its reach. In addition, the historical and presently existing views shared by many in our society concerning deviate and non-deviate sexual conduct afford a rational basis for this legislative classification. The Legislature may have rationally concluded that solicitation by loiterers for deviate sexual activity is more offensive to the standards of public morality and, thus, more egregious than is the solicitation to participate in non-deviate sexual conduct. The reasonableness of this distinction is borne out by practical experience and common observation and these considerations prevent the destruction of the statute by the judiciary on the ground that it is arbitrary (cf *Town of Huntington* v *Park Shore Country Day Camp*, 47 NY2d 61, 66; *Dandridge* v *Williams*, 397 US 471, 485). Given the legitimate interest of the State in suppressing the activity proscribed by section 240.35 (subd [3]) and since the statute does not directly embrace a fundamental interest or a suspect classification, the equal protection clause is not offended.

Next, insofar as it is claimed that equal protection is violated on the ground that the statute is selectively enforced, there is no showing that it is knowingly and intentionally unenforced against those known to have committed this offense (see *Matter of Dora P.*, 68 AD2d 719, 733). Accordingly, this argument is also rejected.

Finally, it said that the statute is void for vagueness on the ground that the phrase "other sexual behavior of a deviate nature" fails to give adequate notice of the conduct declared to be criminal. This phrase, however, represents a permissible legislative technique to avoid the cataloguing of the multiple variations of deviate sexual behavior. The courts may competently construe this phrase by appropriately restricting its

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meaning (see *People* v *Illardo*, 48 NY2d 408). This phrase when measured by common understanding and practice adequately establishes sufficient warning as to the conduct to be avoided. Furthermore, none of the present defendants are in position to maintain uncertainty insofar as their acts are concerned.

The judgments against Robert Uplinger and Fredericka Sanders are affirmed; and the order dismissing the charge against Susan Butler is reversed and the case remitted to the City Court of Buffalo for further proceedings.

This memorandum constitutes the order of the Court.

Joseph P. McCarthy
J.C.C.

DATED: Buffalo, New York
May 3, 1982.

APPENDIX D
MEMORANDUM AND ORDER IN
PEOPLE v. UPLINGER
DATED NOVEMBER 9, 1981

CITY COURT OF BUFFALO

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

vs.

ROBERT UPLINGER,

Defendant.

Docket No. 4C 58993

The defendant is charged with soliciting a plainclothes policeman on a street to commit oral sex with him at his apartment. He is charged with a violation of section 240.35-3 of the Penal Law which prohibits loitering in a public place for the purpose of engaging in or soliciting another person to engage in deviate sexual intercourse. The term deviate sexual intercourse is defined only once in the Penal Law and that is as certain types of sexual conduct between persons not married to one another (Section 130.00-2). Therefore, what is proscribed by section 240.35-3 is loitering involving persons not married to one another.

The question presented by this case is whether section 240.35-3 of the Penal Law violates the equal protection clause of the fourteenth amendment of the United States Constitution in light of *People* v. *Onofre* (51 NY 2d 476, 434 NYS 2d 947, 415 NE 2d 936 (1980), cert. denied 101 S Ct. 2323 (1981)). *Onofre* struck down section 130.38 of the Penal Law which prohibited persons not married to one another from engaging in deviate sexual intercourse. It held that there was no rational basis to

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Dated November 9, 1981

explain the different treatment accorded unmarried as opposed to married persons who engage in deviate sexual intercourse with one another. It found that the law was unconstitutional even as it applied to persons not married to one another who engage in deviate sexual intercourse in public. (Id 51 NY2d at 485, 434 NYS 2d at 949)

In a prior decision, this court ruled that section 240.35-3 of the Penal Law was unconstitutional in a case involving a prostitute and her customer who were engaging in oral sex in a car on a street.[1] The court held that these facts were basically the same as those in the *Onofre* decision and that, charging the defendant under the loitering statute, did not serve to distinguish the case in any way from the consensual sodomy statute which *Onofre* declared unconstitutional. At a hearing held in the instant case on the issue of the statute's constitutionality, Officer Kenneth Burgstahler of the Buffalo Police Department Vice Squad testified that section 240.35-3 is used only against prostitutes and their customers and against homosexuals. The question then presented by this case is whether the statute is likewise unconstitutional as it is applied to male homosexuals.

On its face, there would seem to be no question that the statute is unconstitutional because it is obviously applied to unmarried as opposed to married persons. However, historically, according to the testimony of Captain Kenneth Kennedy of the Buffalo Police Department Vice Squad, who testified at the same hearing, the law has always been applied to male homosexuals. He testified that it is only recently, with the advent of the *Onofre* decision, that the law has been applied to female

[1] *People v. Butler* — NYS 2d — decided September 8th, 1981.

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prostitutes and their customers in an attempt to circumvent the effect of the *Onofre* decision. Also, the predecessor statute to section 240.35-3 seemed to be directed against male homosexuals because it prohibited loitering "about any public place soliciting men for the purpose of committing a crime against nature or other lewdness" (Disorderly Conduct, former Penal Law Section 722-8; See Commission Staff Notes on the proposed New York Penal Law (the current Penal Law section 250.15). And this Court has not been able to find any reported cases under section 722-8 or section 240.35-3 that deal with anyone other than male homosexuals. Therefore, with this prospective, and especially in light of this court's holding in *People* v. *Butler Supra* declaring the statute unconstitutional as applied to prostitutes and their customers, the court will treat the statute as referring only to male homosexuals. If the law then is specifically aimed at homosexuals, the fact that they are not married to one another is secondary to their being homosexuals and cannot be grounds for finding the statute unconstitutional.

The larger question as to the statute's constitutionality remains since the statute is seeking to ban loitering to engage in what is now a constitutionally recognized and protected activity. The situation is very much unlike that in *People* v. *Smith* (44 NY 2d 613, 407 NYS 2d 462 (1978)) where the Court of Appeals upheld the constitutionality of a law proscribing loitering for the purpose of prostitution (section 240.37-2 of the Penal Law) which is a prohibited activity. But, as this court pointed out in *People* v. *Butler Supra,* the courts of this State have prohibited loitering to perform an act which a person may have a perfect right to perform. In *People* v. *Johnson* (6 NY2d 549 (1959)), the Court of Appeals upheld the constitutionality of a statute which prohibits what may amount to no more than

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simple loitering in or about schools (section 240.35-5 of the Penal Law) because of the possible danger this activity poses to children. From this and other cases, this court in *Butler* concluded that simple loitering can be legitimately banned depending on where it occurs and other circumstances. Therefore, despite the fact that persons have a lawful right to engage in deviate sexual intercourse, loitering in public for this purpose may be constitutionally proscribed depending on its effect on the public welfare. As in *People* v. *Smith Supra*, there must be some connection shown between the proscription and a legitimate public concern. But, because male homosexuals are being singled out from the entire population, the People must show a strong connection between their activities and the public welfare.

To determine whether such a connection exists, the court must first examine the facts of the instant case as well as the testimony derived from a hearing held to decide this issue. The court held the non-jury trial of this case after it had reserved its decision on the issue of the constitutionality of the statute at the conclusion of the hearing. Both parties had stipulated to this procedure and agreed that the court could consider the facts developed at trial as evidence also as to the issue of the constitutionality of the statute. The court has done this and reserved its decision on the question of constitutionality and, if necessary, the guilt or innocence of the defendant until now.

The facts of the case, as presented at the trial on September 24th, 1981, are that, on August 7th, 1981, an undercover Buffalo policeman, Steven Nicosia, was assigned to talk to suspected homosexuals and arrest them if he was propositioned in public. He was sitting on the steps of the Hotel Lenox at about 3:00 A.M. when he was approached by the defendant. The Hotel Lenox consists of apartments mainly for middle-

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aged and elderly people on North Street between Delaware Avenue and Irving Street in the City of Buffalo. This is a business and residential area undergoing some renewal with good quality homes and apartments close to the downtown area.

The defendant said, "Hi, how are you". After a little bit of conversation, he asked Nicosia if he wanted to get high and Nicosia said "No". He asked Nicosia what he liked to do and Nicosia said, "I don't know. What do you like to do?" This went on back and forth for a minute or so. Three or four of the defendant's friends approached and talked to the defendant. He introduced Nicosia to them. Then a police car drove up and the police told the defendant, Nicosia and the others to move on.

The defendant followed Nicosia down the street. He caught up with him and asked Nicosia if he wanted to go to his place. Nicosia asked him what he wanted to do. The defendant said, "Well, do you just want to come over?" Nicosia said, "No, I'm scared with the police. I'm going to leave". The defendant said, "If you drive me over to my place, I'll blow you". Nicosia arrested him at this point. The whole incident took between ten and fifteen minutes.

At the hearing held on September 24th and October 22nd, 1981, a local homeowner, the owner of the Lenox Hotel, the district councilman and Captain Kennedy and Officer Burgstahler testified that a number of male homosexuals would congregate on North Street beween Delaware and Elmwood Avenues and, on the various street corners, soliciting companions. They testified that there was heavy automobile traffic caused by homosexuals driving through this area in response to the soliciting. Although the most the homeowner and hotel

owner would say was that it made them "apprehensive", the court finds that this soliciting in front of and near their homes and businesses significantly interfered with the use and enjoyment and worth of the property of those in the neighborhood.

Captain Kennedy testified that he received a recent complaint from a local resident that her teenage son was afraid to leave the house because he was continually solicited by groups of homosexuals on the street corners. He received another complaint from a man who said he was afraid to pass the corner of Delaware Avenue and North Street because there were so many homosexuals there that it looked like a stag line. Captain Kennedy testified that his men made many arrests, similar to the instant one, in the area where homosexuals would solicit undercover officers.

The defendant in response states that homosexuals have a right to associate with one another in public and one aspect of this right is the opportunity to make discrete inquiries of a prospective companion to have sex in private.[2] The defendant concedes that the exercise of this right can effect the rights of others in the area, but states that, since the streets are public, his right to associate with his friends is equal to those of any neighboring homeowners or businessmen.

But, from the testimony at the hearing, the court finds that the offensive conduct in the area is mainly due to the activities of male prostitutes. This is not to deny that homosexuals solicit

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[2]The defendant terms this a right of free speech and cites three States which have overturned similar laws as violative of this right (California (*Pryor v. Los Angeles Municipal Court*, 25 Cal. 3rd 238 (1979)); Massachusetts (*Commonwealth v. Sefranka* — Mass. — 414 N.E. 2d 602 (1980)); Colorado (*People v. Gibson*, 184 Col. 444, 521 P. 2d 774 (1974)).

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one another, and occasionally someone else, on the streets in some numbers. But it is the male prostitutes who confront passersby with frank sex talk. They are the ones who attempt to flag down cars. All of the councilman's complaints were of the activities of male prostitutes. Also, neither the homeowner nor the owner of the hotel could recall ever hearing about anyone in the neighborhood actually having been solicited by a homosexual. Only the councilman could say that he had ever been solicited and that was by a male prostitute in the area. And, in addition, Officer Burgstahler testified that it took an average of ten minutes of talking with a homosexual to get him to solicit him so that he could be arrested. This is hardly the picture of the aggressive male homosexual.

But the homosexuals and the male prostitutes do solicit and loiter near one another on North Street and the court finds that there is a connection between the activities of these two groups. The homosexuals came to the area first, and the male prostitutes followed to ply their trade among homosexuals who would pay for younger men. There is also some interaction between the two groups who are soliciting side by side. And although, according to Captain Kennedy, there is no great incidence of crime as a result of the activities of the male prostitutes as yet, it is only a matter of time before the robberies, assaults, and even murders that are endemic to the activities of male prostitutes elsewhere will also appear on North Street.

However, based on the testimony at the hearing, the court finds that the connection between homosexuals and male prostitutes is not the main reason that the community and the

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police are opposed to this type of loitering in the area.[3] The main reason is that the occasional soliciting of a teenager or others by homosexuals and the appearance of homosexuals outside homes reinforces the age-old fear that people have of homosexuals and renews the offense they take at their activities. Only part of this offense is due to the fact that some of the conduct of homosexuals takes place in public.[4] And only part of the opposition people have to them is due to the economic loss to businesses and to the value of their homes that occurs when this activity takes place in an area. Some of the opposition is without foundation, but some also is grounded in the real possibility that a man or his son may be solicited, harrassed or confronted at the very door to his house.

The defendant answers by stating that the same objections that the community has against homosexuals can be brought against Blacks, or Spanish, or different ethnic minorities who might loiter on corners. But the Court finds that the activities of homosexuals who solicit on the streets offends the public at large wherever it occurs and the objections to it are not aimed at any specific racial or ethnic group.

The defendant also argues that new laws should be drawn to meet the specific objections that he sees to be the problem, such

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[3]This conclusion is consistent with the fact that male prostitutes and homosexuals do not appear together in every location. According to Captain Kennedy, male prostitutes did not accompany the male homosexuals when the homosexuals solicited at some location on Seneca Street for many years. Also, there are no male prostitutes with the male homosexuals who are soliciting in LaSalle Park at present.

[4]However, the public has no way of telling the difference between a homosexual who is soliciting to take a companion back to his apartment and one who is soliciting and will commit sex in public.

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as crowding on the streets or the street corners; but the defendant admits that he himself would have trouble drawing such a law.[5]

The Court finds that homosexuals come to North Street to find a safe place to meet one another, even if it involves public soliciting. For some reason, bars and other types of meeting places, that seem to suit hetrosexuals and other homosexuals, do not suffice for the homosexuals that come to North Street. There is no proof why certain homosexuals find it necessary as part of their life style to solicit a companion on the streets, but it seems to be the case. Hetrosexuals and other homosexuals do not engage in this activity so that this law cannot be viewed as discriminatory in its application.

The burden of proof is on the defendant to show that the law should be found to be unconstitutional. The defendant must convince the court of this beyond a reasonable doubt.[6] The People, through their legislators, have a wide and well recognized latitude to enact every sort of law, even stupid ones. The court finds that it cannot say that the People have failed to show beyond a reasonable doubt that a relationship exists between male homosexuals who loiter on the streets to solicit one another and a valid public purpose in prohibiting this. The

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[5]See *People* v. *Diaz*, 4 NY 2d 469, 176 NYS 2d 313, 171 NE 2d 871 (1958) which struck down a law which prohibited loitering because there was no stated purpose or intent set forth in the statute to specify what sort of loitering.

[6]*People v. Pagnotta*, 25 NY 2d 333, 305 NYS 2d 484, 253 NE 2d 202; but see *Eisenstadt* v. *Baird* 405 US 438, 447, N. 7, and Gender Based Statutory Rape Legislation and the Equal Protection Clause: *Michael M. v. Superior Court of Sonoma County*, 101 S.Ct. 1200 (1981), Vol. 19 No. 1 AM. Crim. L. Rev. 99 (1981) for possible different standards.

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court finds that a sufficient connection exists between the public's loss of the use and enjoyment of its streets, businesses, and homes and the activity at issue to warrant this ban. The activity of homosexuals who loiter on the streets to solicit one another is akin to the loitering of prostitutes in its effect on the public (See *People v. Smith supra*), even though prostitution can readily be distinguished as an illegal activity. The defendant cannot create an ideal test tube situation and ask that his conduct be viewed apart from its surrounding social implications, nor can he blame the public for its reaction to his activities when the reaction is in large measure understandable.

For the foregoing reasons, the court denies the defendant's motion to dismiss the charge brought against him on the grounds that section 240.35-3 of the Penal Law is unconstitutional because it violates the defendant's rights guaranteed him by the equal protection clause of the fourteenth amendment of the United States Constitution as well as rights guaranteed him by other sections of the United States Constitution and the companion protections of the New York State Constitution. Accordingly, having heard the evidence at trial, the court finds the defendant guilty as charged.

Submit Order.

/s/ TIMOTHY J. DRURY
Timothy J. Drury
City Court Judge

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Dated November 9, 1981

At a Trial Term of the City Court of the City of Buffalo, held in Part 3, Buffalo City Court Building, this 9th day of November, 1981.

PRESENT: Hon. Timothy J. Drury, City Court Judge

STATE OF NEW YORK — BUFFALO CITY COURT
COUNTY OF ERIE

PEOPLE OF THE STATE OF NEW YORK

vs.

ROBERT UPLINGER,

Defendant.

Docket No. 4C 58993

ORDER ON MOTION TO DISMISS AND VERDICT ON TRIAL

The defendant herein having been charged with loitering for deviate sex purposes, in violation of Penal Law Section 240.35-3, and having appeared herein by his attorneys, Hodgson, Russ, Andrews, Woods & Goodyear (William H. Gardner, of counsel), and the defendant having moved this Court by Notice of Motion, dated August 8, 1981, and Affirmation of William H. Gardner, dated August 8, 1981, for an Order dismissing the charges on the grounds that the Information failed to state the commission of an offense (Gardner Affirmation, paragraph 2), and that Section 240.35-3 of the Penal Law is unconstitutional, and the People having appeared by Edward C. Cosgrove, District Attorney of Erie County (Thomas W. Lokken,

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Assistant District Attorney, of counsel), and having submitted the Responding Affirmation of Thomas W. Lokken, dated September 23, 1981, in opposition to defendant's motion, and the Court having conducted a pre-trial hearing on September 24 and September 25, 1981, on the application of the People, and having received thereat testimony from the following persons:

(a) Captain Kenneth Kennedy, Chief of the Bureau of Vice Investigation of the Buffalo Police Department;

(b) Timothy A. McCarthy, a homeowner and resident of the area whereat the alleged offense occurred;

(c) Robert Freudenheim, the owner of the Lenox Hotel on North Street, Buffalo, New York, in the area of which the alleged offense occurred;

(d) William L. Marcy, Jr., a member of the Common Council of the City of Buffalo, representing the councilmanic district wherein the alleged offense occurred;

(e) Kenneth Burgstahler, a Buffalo police officer assigned to the Bureau of Vice Investigation of the Buffalo Police Department;

and the defendant having, in open court, withdrawn his motion to dismiss the Information on the ground that the Information Information failed to state the commission of an offense (Gardner Affirmation, paragraph 2), leaving only the question of the constitutionality of the statute for decision by the Court, and the Court having thereupon closed the pre-trial hearing and having taken the matter under advisement, and the People and the defendant having then consented to an immediate trial, and, further, having consented that any testimony taken at the trial might be considered as further evidence upon the pre-trial hearing, and the Court having thereupon held a trial, and

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having heard the testimony of Steven J. Nicosia, a Buffalo police officer assigned to the Bureau of Vice Investigation and the arresting officer herein (having been presented by the People), and the defendant having presented no evidence but having moved to dismiss the charges both at the conclusion of the People's case and after resting the defense case, and the Court having then taken the trial under advisement concurrently with consideration of the defendant's pre-trial motion for dismissal of the charges;

And the Court having, on its motion and with the consent of the People and the defendant, reopened the hearing on the pre-trial motion for dismissal of the charges and having taken further proof on October 22, 1981, at which time the Court heard further testimony from Captain Kenneth Kennedy and from Buffalo Police Officer Steven J. Nicosia, and the Court having again reserved decision on the defendant's pre-trial motion and on the evidence submitted at the trial;

And the Court having thereafter issued its Memorandum Decision herein on November 9, 1981, and having filed the same, and having ruled therein that the statute, Penal Law Section 240.35-3, when enforced against homosexuals, is constitutional, for the reasons more particularly stated therein.

NOW, on motion of Edward C. Cosgrove, Erie County District Attorney (Thomas Lokken, Assistant District Attorney, of counsel), it is

ORDERED, that defendant's motion to dismiss the charges on the ground that Penal Law Section 240.35-3 is unconstitutional is in all respects denied; and it is further

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ORDERED AND FOUND, on the evidence submitted at the trial, that the defendant is guilty of the offense charged; and it is further

ORDERED, that the defendant appear before the Court on November 16, 1981, at 2:00 P.M. of that day, for sentencing.

DATED: Buffalo, New York
November 9, 1981

/s/ TIMOTHY J. DRURY
Timothy J. Drury,
City Court Judge

APPROVED AS TO FORM AND SUBSTANCE:
EDWARD C. COSGROVE, District Attorney

By: /s/ VINCENT M. GAUGHN, JR.
Assistant District Attorney

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR

By: /s/ WILLIAM H. GARDNER
William H. Gardner

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DECISION AND ORDER IN *PEOPLE V BUTLER* DATED SEPTEMBER 8, 1981

CITY COURT OF THE CITY OF BUFFALO
COUNTY OF ERIE

PEOPLE OF THE STATE OF NEW YORK

Plaintiff

vs.

SUSAN BUTLER

Defendant

Docket No. 4C-53628

DECISION

The question presented by this case is whether Section 240.35-3 of the Penal Law, which prohibits loitering in a public place for the purpose of engaging in or soliciting another person to engage in deviate sexual intercourse, is constitutional in light of *People v. Onofre* (51 NY 2d 476, 434 NYS 2d 947, 415 NE 2d 936 (1980), cert. denied 101 S Ct. 2323 (1981)). In *Onofre* the Court of Appeals struck down Section 130.38 of the Penal Law which prohibited persons not married to one another from engaging in deviate sexual intercourse. The term deviate sexual intercourse is defined only once in the Penal Law and that is as certain types of sexual conduct between persons not married to one another. Therefore, what is proscribed by Section 240.35-3 is loitering involving parties not married to one another.

The *Onofre* case ruled that the consensual sodomy statute was unconstitutional because there was no compelling reason shown to abridge the defendant's right of privacy to engage in certain types of sexual conduct nor any justification given to

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explain the different treatment accorded unmarried as opposed to married persons. Therefore, the question before this Court is whether there is any rational basis to justify a prohibition against loitering for a purpose which one has a recognized and protected right to engage in, and whether there is reason to warrant enforcing this prohibition against persons not married to each other.

In deciding this question, it is well to recognize first that it is not the purpose or intent that an individual might have that is being proscribed, but it is loitering with this purpose or intent that is the subject of this statute (See *People* v. *Diaz* 4 NY 2d 469, 470-1 (1958)). Therefore, it may be that a person might have a perfect right to perform some act that he or she might not be allowed to loiter to do.

Also, the Court of Appeals has recognized that what may amount to no more than simple loitering can be legitimately prohibited depending where it occurs and other circumstances, for instance, in *People* v. *Johnston* (6 NY 2d 549 (1959)), the Court of Appeals upheld the constitutionality of a statute which bans loitering in or about schools (Section 240.35-5 Penal Law) because of the danger this posed to children from drug peddlers and sex offenders and because of the danger of fire to the school building. In *People* v. *Merolla* (9 NY2d 62, 211 NYS 2d 155, 172 NE 2d 541 (1961)), the Court of Appeals likewise upheld a ban on loitering on wharfs and docks because these were areas where the likelihood of illegal activity was notorious. Similarly, a statute forbidding loitering about toilets and railway platforms has been upheld (*People* v. *Bell*, 306 NY 110, 115 NE 2d 871 (1953)). Therefore, the mere fact that an activity is innocent or legitimate does not decide the matter. What is significant are the facts of this particular case and the reasons offered by the People to show that the law is necessary.

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The facts of the case are that the defendant was a known prostitute and, on April 1st, 1980 about 4:00 in the morning, she was observed waving at cars at the intersection of Genesee and Davis Streets in the City of Buffalo. This is an area frequented by prostitutes. The defendant approached the co-defendant's car and, after a conversation, she got in. They were found a short time later parked nearby engaging in deviate sexual intercourse. They were not married. The co-defendant requested and was granted an adjournment in contemplation of dismissal (Section 170.55 of the Criminal Procedure Law). He does not wish to contest the constitutionality of the statute.

At a hearing, pursuant to the defendant's motion attacking the constitutionality of the statute, Captain Kenneth P. Kennedy of the Buffalo Police Department Vice Squad testified and defended the police policy of making arrests under this statute. He said it was necessary to control vice in this and other neighborhoods. He testified that he had received a great many complaints from residents in this neighborhood of sexual activity occurring in public. Residents complained of couples having sex in cars parked on neighborhood streets, parked in alleys and even in back yards. They complained that this conduct occurred in the daytime in cars parked on the street where schoolchildren could observe it.

No neighborhood or community can tolerate these conditions and, obviously, they are the legitimate concern of the police. But this Court and other Courts are concerned about the type of statute that is being employed to correct conditions of this sort and the manner in which it is being employed.

The *Onofre* case for the most part discussed a type of private and discreet sexual conduct very unlike the situation depicted in this case. But *Onofre* also dealt specifically with this sort of

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conduct. In *Onofre* the Court of Appeals stated that an individual's right of privacy did not extend to consensual sodomy that occurs in public. However, the Court found that the equal protection clause of the Fourteenth Amendment of the United States Constitution prohibited a State from banning consensual sodomy, even in public, between persons not married to one another. (See *Onofre supra* 485). The Court of Appeals reached this decision after the People were given full and ample opportunity to show "some ground of difference that rationally explains the different treatment accorded married and unmarried persons" (*Ibid,* 491, quoting *Eisenstadt* v. *Baird,* 405 US 438, 447 (1971)). The Court found that there was none.

In the instant case, it would be foolhardy to deny that there is not some connection between loitering to engage in deviate sexual intercourse and the open display of sexual conduct that offends the public. But there has been nothing shown in this case to differentiate the display of sexual conduct that Captain Kennedy testified to from the circumstances that existed in and were before the Court of Appeals in the *Onofre* case. Two of the three cases dealt with in *Onofre* concerned parties having sex in automobiles parked on city streets, and in one case, it was in a residential area. And there is nothing to indicate that the loitering aspect of the statute adds anything to the instant case or serves to distinguish it in any way from the *Onofre* decision.

What the public is complaining about is really the activities of prostitutes and the laws against prostitution and loitering for the purpose of prostitution would seem to constitute adequate safeguards against those abuses. Perhaps a law forbidding the public display of sexual conduct would be an added measure to this end and it would serve the purpose of actually dealing with

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the conduct that offends the public as opposed to whatever effect that the loitering statute might have.

For the foregoing reasons, the Court is constrained to find that the statute prohibiting loitering to engage in deviate sexual intercourse is unconstitutional because it violates the equal protection clause of the Fourteenth Amendment of the United States Constitution.

But there is another and equally fundamental problem in the enforcement of this statute that also affects its constitutionality that was disclosed at the hearing held to determine this issue. At the hearing, the arresting officer, Kenneth H. Burgstahler, testified that 99% of the women arrested under this statute are prostitutes and that they are charged when the police do not have enough evidence to charge them with prostitution (Section 230.00 of the Penal Law) or loitering for the purpose of prostitution (Section 240.37-2 of the Penal Law). He testified that, in the instant case, the defendant was charged with loitering to engage in deviate sexual intercourse so that her co-defendant could be charged also. He said otherwise, the police did not have sufficient grounds to charge him with anything else. Therefore, the co-defendant was charged because he patronized a prostitute (a violation of Section 240.03 of the Penal Law), an accusation that could not be sustained in court. It would appear that the police had sufficient evidence to charge the defendant with loitering for the purpose of prostitution if charging her co-defendant was not a factor.

This case illustrates the problem with using the statute prohibiting loitering to engage in deviate sexual intercourse to fight prostitution. The problem is that the determining factor as to who or who is not charged under this statute, in other words, who or who is not a prostitute or a prostitute's

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customer, is not part of the crime and that factor does not come to court and is never litigated in court. Therefore, the police have the sole discretion in determining who is or who is not to be arrested, and no court or jury ever decides or reviews this critical fact. Such unfettered discretion is totally unacceptable, and a former loitering statute was struck down by the Court of Appeals for this very reason (See *People* v. *Berck* 32 NY 2d 567, 347 NYS 2d 33 (1973), cert. denied 414 US 1093 (1973)). Therefore, the Court finds that the statute prohibiting loitering to engage in deviate sexual intercourse is unconstitutionally vague in violation of the Fourteenth Amendment of the United States Constitution because, by allowing the police such discretion, it encourages arbitrary and discriminatory enforcement of the law.[1]

In reaching its decision on the constitutionality of the statute on the two grounds as set forth, the Court does so only as the statute applies to the particular facts and circumstances before it. Other facts may warrant an entirely different decision, particularly in light of *People* v. *Smith* (44 NY 2d 613, 407 NYS 2d 462 (1978)), which upheld the constitutionality of the statute which prohibits loitering for the purpose of prostitution (Section 240.37-2 of the Penal Law) on the grounds that this activity interfered with the commercial life and the public use and enjoyment of the streets and other areas effected.

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[1]See contra *People* v. *Willmott* 62 Misc. 2d 709, 324 NYS 2d 616 (Justice Court 1971), which predated the *Onofre* decision and did not deal with the arbitrary enforcement of the statute.

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Accordingly, the charge against the defendant is hereby dismissed.

Submit Order.

/s/ TIMOTHY J. DRURY
Timothy J. Drury
Associate Judge

At a Term Part 3 of the City Court of Buffalo, held in and for the County of Erie, at the Buffalo City Courthouse located in the County of Erie, State of New York, on the 8th day of September, 1981

PRESENT: Hon. Timothy J. Drury,
Justice of City Court

PEOPLE OF THE STATE OF NEW YORK

Plaintiff

-vs-

SUSAN BUTLER

Defendant

A motion having been made by the above named Defendant to dismiss the information as defective pursuant to Section 170.35 of the Criminal Procedure Law, and the said motion having only come on to be heard before me.

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Now upon reading and filing the memorandum of law submitted in support of said motion, and the information herein, all submitted in support of said motion, and upon all other papers and proceedings heretofore had herein, and after hearing Richard A. Boccio, Attorney for said Defendant, Veronica D. Thomas, of Counsel, and Hon. Edward C. Cosgrove, District Attorney of Erie County, Daniel R. Slade of Counsel, in opposition thereto, and due deliberation having been had thereon, and upon filing the opinion of the Court, it is hereby

ORDERED that the information be, and hereby is dismissed and it appearing to the Court that the statute defining the offense with which the Defendant is charged in the particular instance is unconstitutional, it is further

ORDERED that the Defendant be and hereby is discharged from custody and that her bail be and hereby is exonerated.

ENTER

/s/ TIMOTHY J. DRURY
Justice of the City Court
Of Buffalo

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